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No. 80-89

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEAK REPAIRS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. On August 27, 1980, the Board issued its decision and order in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. No. 150.[1] In that decision, the Board reconsidered its traditional test for determining whether an employee discharge violates Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), and reformulated it to conform to the

[1] The Board's opinion, appended hereto as a supplemental appendix, is referred to as "S.A."

analysis set forth by this Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Thus, the Board announced that it will henceforth apply the following test in discharge cases (S.A. 22a):

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected [employee] conduct was a "motivating factor" in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the [discharge] would have taken place even in the absence of the protected conduct.

Compare *Mt. Healthy*, *supra*, 429 U.S. at 287 (applying same analysis in First Amendment context); *Arlington Heights*, *supra*, 429 U.S. at 270–271 n.21 (applying same analysis in housing discrimination context).

2. Because this is a "pretext," rather than a "mixed motive," case,[2] and the Board previously viewed each

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[2] As shown at page 6 and note 5 of our brief in opposition, the Board and the court below expressly rejected petitioner's assertion that the discharges of Paver and Jenkins were motivated *at all* by permissible considerations and found that the "real reason" for the discharges was petitioner's opposition to their union and related concerted activities. Therefore, contrary to petitioner's claim, the record in the instant case does not provide the requisite factual basis for finding a "mixed" or "dual" motive, for there is no credited evidence that petitioner had other than a proscribed object in effecting the discharges.

situation differently,[3] it did not have occasion to consider the applicability of the *Mt. Healthy* test in this case. However, in *Wright Line*, the Board announced its intention to apply the *Mt. Healthy* test to both "pretext" and "mixed motive" cases. As shown at pages 6 to 8 of our brief in opposition, the application of the *Mt. Healthy* test to the facts here would not change the Board's ultimate conclusion in this case. It is undisputed that the Board established a prima facie case of antiunion discrimination, and, as the court below expressly found (Pet. App. 33a–34a), petitioner utterly failed in its attempt to show that Paver and Jenkins would have been fired even in the absence of antiunion considerations.

[3] As the Board explained in *Wright Line* (S.A. 4a–5a):

> In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.
>
> The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. * * * This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive* * *.

CONCLUSION

For these reasons as well as those set forth in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1—CA—14004

WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC.

and

BERNARD R. LAMOUREUX: AN INDIVIDUAL

DECISION AND ORDER

On October 27, 1978, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and

[1] Respondent contends that the Administrative Law Judge's credibility resolutions, findings of fact, and conclusions of law stem from bias or hostility. We find no merit in this contention. There is no basis for finding that bias or partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Moreover, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91

conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

Respondent excepted, *inter alia*, to the Administrative Law Judge's conclusion that it violated Section 8(a)(3) and (1) of the Act when, on December 30, 1977, it discharged Bernard Lamoureux. We agree with the result reached by the Administrative Law Judge, but only for the reasons that follow.

In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, *inter alia*, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. As discussed *infra*, various "tests" have been employed by the Board and the courts to aid in making such determinations. These tests all examine the concept of "causality," that is, the relationship between the employees' protected activities and actions on the part of

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NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent has excepted to the Administrative Law Judge's recommended broad cease-and-desist order. In our recent decision in *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Inasmuch as the instant violations do not meet this test, we shall modify the Administrative Law Judge's Order to require Respondent to refrain from violating the Act in any like or related manner.

their employer which detrimentally affect their employment.

The Administrative Law Judge's Decision in the instant case reveals some uncertainty regarding the appropriate mode of analysis for examining causality in cases alleging unlawful discrimination. Indeed, similar doubts as to the applicable test appear to have become widespread at various levels of the decisional process primarily as a result of conflict in this area among the courts of appeals and between certain courts of appeals and the Board.

After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act. We shall examine causality in such cases through an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

It is our belief that application of the *Mt. Healthy* test[3] will maintain a substantive consistency with existing Board precedent and accommodate the concerns expressed by critics of the Board's past treatment of cases alleging unlawful discrimination. We further find the *Mt. Healthy* test to be in harmony with the Act's legislative history as well as pertinent Supreme Court decisions. Finally, in this regard, enunciation of the *Mt. Healthy* test will alleviate the confu-

[3] For ease of reference, we shall refer to this test of causality as the *Mt. Healthy* test. We note, however, that *Mt. Healthy* itself does not constitute a construction of the National Labor Relations Act and, accordingly, our Decision here is not compelled by *Mt. Healthy*. We do not view *Mt. Healthy* as at odds with our previous construction of the Act.

sion which now exists at various levels of the decisional process and do so in a manner that, we conclude, accords proper weight to the legitimate conflicting interest in this area, thereby advancing the fundamental objectives of the Act.

I. THE DISTINCTION BETWEEN PRETEXT AND DUAL MOTIVE

It is helpful, initially, to distinguish between what are termed "pretext" cases and "dual motive" cases because it is in the dual motive situation where the legitimate interests of the parties most plainly conflict. Consequently it is in such situation that the existing controversy and confusion in this area are highlighted.[4]

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

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[4] As is demonstrated herein, under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases.

The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation.[5]

II. THE "IN PART" TEST

For a number of years now, when determining whether the Act has been violated in a dual motivation case, the Board has applied what is termed the "in part" causation test. In its present form the "in part" test provides that if a discharge is motivated, "in

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[5] Unfortunately, the distinction between a pretext case and a dual motive case is sometimes difficult to discern. This is especially true since the appropriate designation seldom can be made until after the presentation of all relevant evidence. The conceptual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense. Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained. Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases. See *Bedford Cut Stone Co., Inc.*, 235 NLRB 629 (1978).

part," by the protected activities of the employee the discharge violates the Act even if a legitimate business reason was also relied on. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574, 575 (1976). This "in part" analysis has taken various forms with the "in part" language being modified while the underlying concept remains intact. Thus, the Board has used the following terms in dual motivation cases: "the motivating or moving cause," *The Bankers Warehouse Company*, 146 NLRB 1197, 1200 (1964); "the motivating factor," *Tursair Fueling, Inc.*, 151 NLRB 270, 271, fn. 2 (1965); "the substantial, contributing factor," *Erie Sand Steamship Company*, 189 NLRB 63, fn. 1 (1971); "motivated principally," *P.P.G. Industries, Inc.*, 229 NLRB 713 (1977); "a substantial cause," *Broyhill Company*, 210 NLRB 288, 296 (1974); "a substantial or motivating ground," *KBM Electronics, Inc., t/a Carsounds*, 218 NLRB 1352, 1358 (1975); "in substantial part," *Central Casket Co.*, 225 NLRB 362 (1976).

Since its inception, the "in part" test has been perceived by some to be, at least conceptually, at odds with the oft-repeated idea that:

> Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. [*N.L.R.B.* v. *MaGahey*, 233 F.2d 406, 413 (5th Cir. 1956). See also *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Compare *Shattuck Denn Mining Corporation* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).]

A conflict between this concept and the "in part" rationale is seen because in a dual motivation case, the employer does have a legitimate reason for its action. Yet, an improper reason for discharge is also present. Thus, the employer's recognized right to enforce rules of its own choosing is viewed as being in practical conflict with the employees' right to be free from adverse effects brought about by their participation in protected activities. Critics of the "in part" test have asserted that rather than seeking to resolve this conflict and accommodate the legitimate competing interests, the analysis goes only half way, in that once hostility to protected rights is found, the inquiry ends and the employer's plea of legitimate justification is ignored.

III. THE ADVENT OF THE "DOMINANT MOTIVE" TEST AND THE LAW OF THE CIRCUITS

In recent years, various courts of appeals have become increasingly critical of the "in part" analysis. The earliest, most outspoken critic of the "in part" test has been the First Circuit, which in *N.L.R.B.* v. *Billen Shoe Co., Inc.*, 297 F.2d 801 (1st Cir. 1968), examined the Board's application of the "in part" analysis and found it lacking.[6] Fundamental to its rejection of the "in part" test is the court's view that the test ignores

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[6] Actually, as early as 1953, in *N.L.R.B.* v. *Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953), that circuit court expressed disagreement with Board analysis in 8(a)(3) cases. Yet, it was not until 1963 that Judge Aldrich of the First Circuit formally initiated the "dominant motive" or "but for" test. See *N.L.R.B.* v. *Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963).

the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established.

In an effort to remedy what it viewed as the inequities of the test, the First Circuit began to advance its own process of analysis in dual motivation cases. Thus, in *Billen Shoe, supra*, the First Circuit stated that:

> When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough. [397 F.2d at 803.]

In other opinions, the First Circuit has termed its test a "dominant motive" (see fn. 6, *supra*) or a "but for" test. *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 505 F.2d 1293 (1st Cir. 1977). For our purposes, this test will be referred to as the "dominant motive" test, which, in its most simple form provides that when both a "good" and "bad" reason for discharge exist, the burden is upon the General Counsel to establish that, in the absence of protected activities, the discharge would not have taken place. *Coletti's Furniture, supra* at 1293, 1294; *N.L.R.B.* v. *Fibers International Corporation*, 439 F.2d 1311, 1312, fn. 1 (1st Cir. 1971).

Conflict between the Board and the First Circuit in this area has escalated to the point where in *Coletti's Furniture, supra* at 1293, the court stated that "[T]here can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." In addition, the conflict over which test to apply

in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency.[7]

Thus, the District of Columbia Circuit, in *Allen* v. *N.L.R.B.*, 561 F.2d 976, 982 (D.C. Cir. 1977), applied an "in part" test, stating that:

> [T]he cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity . . . .[8]

Several months later, another panel applied the "dominant motive" test as propounded by the First Circuit in *Billen Shoe, supra,* holding that:

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[7] Although it is responsible for the advent of the "dominant motive" test, which now is found in various forms in the Circuits, the First Circuit, in its recent decision in *N.L.R.B.* v. *Eastern Smelting and Refining Corporation*, 598 F.2d 666 (1st Cir. 1979), appears to have moved away from the "dominant motive" test as earlier expressed. In *Eastern Smelting*, the First Circuit articulated and applied for the first time the *Mt. Healthy* test set forth in this opinion. In *Eastern Smelting*, however, the First Circuit did not explicitly abandon its "dominant motive" test, nor did it abate its criticism of the "in part" test.

[8] An "in part" test has also been applied by the Sixth, Seventh, and Tenth Circuits. See *N.L.R.B.* v. *Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL—CIO*, 570 F.2d 586, 590 (6th Cir. 1978), cert. denied 439 U.S. 819; *N.L.R.B.* v. *Gogin, d/b/a Gogin Trucking*, 575 F.2d 596, 601 (7th Cir. 1978); *M. S. P. Industries, Inc., d/b/a The Larimer Press* v. *N.L.R.B.*, 568 F.2d 166, 173—174 (10th Cir. 1977).

> The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one. [*Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL—CIO* v. *N.L.R.B.*, 564 F.2d 434, 440 (D.C. Cir. 1977).][9]

Similarly, the Ninth Circuit has applied both a "dominant motive" and an "in part" test.[10] Then, in *Polynesian Cultural Center* v. *N.L.R.B.*, 582 F.2d 467, 473 (9th Cir. 1978), that court noted that:

> Several of our cases have said that the discriminatory motive must be the moving cause for the discharge. . . . On the other hand, this court has indicated that it too, on occasion, employs the but-for approach.

Tests which have been applied by other circuit courts fit neatly into neither the "in part" nor "dominant motive" category. For example, in *Waterbury Community Antenna, Inc.* v. *N.L.R.B.*, 587 F.2d 90, 98 (2d Cir. 1978), the Second Circuit stated its test as follows:

> The rule of causation applied in this Circuit is that "the General Counsel must at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one." . . . The magnitude of the impermissi-

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[9]This "dominant motive" test has also been applied by the Fourth Circuit. See *Firestone Tire and Rubber Company* v. *N.L.R.B.*, 539 F.2d 1335, 1337 (4th Cir. 1976).

[10]Compare *Western Exterminator Company* v. *N.L.R.B.*, 565 F.2d 1114, 1118 (9th Cir. 1977), with *Penasquitos Village, Inc.* v. *N.L.R.B.*, 565 F.2d 1074, 1082—83 (9th Cir. 1977).

> ble ground is immaterial . . . as long as it was the "but for" cause of the discharge . . . .

The Third Circuit stated in *Edgewood Nursing Center, Inc.* v. *N.L.R.B.*, 581 F.2d 363, 368 (3d Cir. 1978), that:

> [T]he employer violates the Act if anti-union animus was the "real motive" . . . . If two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity . . . . On the other hand, if the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory . . . . Thus, if the employer puts forward a justifiable cause for discharge of the employee, the Board must find that the reason was a pretext, and that anti-union sentiment played a part in the decision to terminate the employee's job.

The Fifth Circuit, in *N.L.R.B.* v. *Aero Corporation*, 581 F.2d 511, 514–515 (5th Cir. 1978), ruled that:

> [T]he Board is not required to establish substantial evidence that the conduct is motivated solely by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was "reasonably equal" to the lawful motive prompting conduct.

Finally, the Eight Circuit has held that:

> [T]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity. [*Singer Company* v. *N.L.R.B.*, 429 F.2d 172, 179 (8th Cir. 1970).]

We note that our citation of the foregoing cases is intended neither to explain nor vindicate the position expressed by any particular circuit court. Rather, it is intended to demonstrate that in an area fundamental to the Act, namely, Section 8 (a) (3), disagreement and controversy are rampant among the various decision-making bodies.

IV. THE *MT. HEALTHY* TEST

As the preceding two sections have demonstrated, the issue of what causation test is to be used to determine whether the Act has been violated in dual motivation cases is now in a position where some view the "in part" test as standing at one extreme, while the other extreme is represented by the "dominant motive" test first advanced by the First Circuit. Despite this perceived polarization, room for accommodation and clarification does exist in the test of causality set forth in the recent Supreme Court decision of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274.

The *Mt. Healthy* case arose when Doyle, an untenured teacher, brought suit against the Mt. Healthy School Board, alleging that it had wrongfully refused to renew his contract. The school board presented Doyle with written reasons for their refusal. The two reasons cited were: (1) Doyle's use of obscene language and gestures in the school cafeteria, and (2) Doyle's conveyance of a change in the school's policies to a local radio station. In his suit, Doyle alleged that the refusal to renew his contract violated his rights under

the first and fourteenth amendments. He sought reinstatement and backpay.

The district court found that of the two reasons cited by the school board, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and Doyle was, therefore, entitled to reinstatement and backpay. The court of appeals affirmed, *per curiam*.

The Supreme Court reversed. In a unanimous opinion, the Court rejected the lower court's application of such a limited "in part" test and ruled that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. The Court reasoned as follows:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enun[ci]ated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a

> position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decisions. [429 U.S. at 285—286.]

From this rationale, the Court fashioned the following test to be applied on remand:

> Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U.S. at 287.]

Thus, the Court established a two-part test to be applied in a dual motivation context. Initially, the employee must establish that the protected conduct was a "substantial" or "motivating" factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.

This test in *Mt. Healthy* is further explicated by the Court in *Village of Arlington Heights* v. *Metropolitan*

Housing Development Corp., 429 U.S. 252 (1977), a case decided the same day as *Mt. Healthy*. A brief discussion of *Arlington Heights* is helpful in examining the parameters of the *Mt. Healthy* test.

Arlington Heights involved an effort by a real estate developer to obtain a zoning change enabling it to construct a housing development. During the zoning hearing, it became apparent that the new development would be racially integrated. The Village ultimately denied the rezoning and, in response, a group brought suit seeking injunctive and declaratory relief alleging that the decision was racially motivated. The Supreme Court ruled that plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." (429 U.S. at 270.)

In reaching its decision, the Court invoked the *Mt. Healthy* test. Thus, the Court, citing *Mt. Healthy*, stated that:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. [429 U.S. at 270—271, fn. 21.]

The *Arlington Heights* decision is instructive in one other respect as well. For in its decision, the Court recognized that efforts to determine what is the "dominant" or "primary" motive in a mixed motivation situation are usually unavailing. In this regard, the Court stated that a plaintiff is not required

> to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. [429 U.S. at 265.]

Assuming for the moment that the *Mt. Healthy* test is applicable to dual motive discharges under Section 8(a)(3), it is evident that *Mt. Healthy* represents a rejection of an "in part" test which stops with the establishment of a *prima facie* case or at consideration of an improper motive. Indeed, rejection of such an "in part" test is implicit in the Supreme Court's reversal of the district court's application of such an analysis.

The "dominant motive" test fares no better under *Mt. Healthy*. While a surface similarity between *Mt. Healthy* and the "dominant motive" test exists in that both reject a limited "in part" analysis and both require proof of how the employer would have acted in the absence of the protected activity, the similarity ends there. For the *Mt. Healthy* test and the "dominant motive" test place the burden for this proof on different parties.

As has been noted, under the "dominant motive" test it is the General Counsel who, in addition to establishing a *prima facie* showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, it is made abundantly clear in *Mt. Healthy* (and was specifically reiterated in *Arlington Heights*) that after an employee or, here, the

General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. This distinction is a crucial one since the decision as to who bears this burden can be determinative.

The "dominant motive" test is further undermined by the *Arlington Heights* decision. As noted above, the Court in *Arlington Heights* eschewed the "dominant motive" analysis by specifically stating that it is practically impossible to examine a dual motivation decision and arrive at a conclusion as to what was the "dominant" or "primary" purpose or motive. *Arlington Heights*, 429 U.S. at 265. Finally, the shifting burden analysis set forth in *Mt. Healthy* and *Arlington Heights* represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation.

V. APPLICATION OF THE *MT. HEALTHY* TEST TO SECTION 8(a)(3)

In the final analysis, the applicability of the *Mt. Healthy* test to the NLRA depends upon its compatibility with established labor law principles and the extent to which the test reaches an accommodation between conflicting legitimate interests. For, as the Supreme Court noted, in unfair labor practice cases:

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effecutate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to

> limited judicial review. [*N.L.R.B.* v. *Truck Driver's Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 353 U.S. 87, 96 (1957).]

Initially, support for the *Mt. Healthy* test of shifting burdens is found in the 1947 amendment of Section 10(c). That amendment provided that:

> No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

While the amendment itself does not address the "in part" or "dominant motive" analysis or the allocation of burdens, the legislative history does. In explaining the amendment Senator Taft stated:

> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. [93 Cong. Rec. 6678; 2 Leg. Hist. 1595 (1947).]

The principle that "the employer has to make the proof" is also found in the Supreme Court's decision in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In that case the Court was concerned with the

burden of proof in 8(a)(3) cases. It first noted that certain employer actions are inherently destructive of employee rights and, therefore, no proof of antiunion motive is required. Of course, the discharge of an employee, in and of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive. In this context, the Court in *Great Dane* stated that:

> [I]f the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U.S. at 34 (emphasis in the original)]

Thus, both Congress and the Supreme Court have implicitly sanctioned the shift of burden called for in *Mt. Healthy* in the context of Section 8(a)(3).[11]

Indeed, as is indicated by the above quotation of legislative history and the citation of *Great Dane*, the shifting burden process in *Mt. Healthy* is consistent

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[11] It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense (see fn. 6, *supra*) to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden.

with the process envisioned by Congress and the Supreme Court to resolve discrimination cases, although the process has not been articulated formally in the manner set forth in *Mt. Healthy*. Similarly, it is the process used by the Board. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so, the inquiry then focuses on whether any "legitimate business reason" asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.[12] Thus, while the Board's process has not been couched in the language of *Mt. Healthy*, the two methods of analysis are essentially the same.

Perhaps most important for our purposes, however, is the fact that the *Mt. Healthy* procedure accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8(a)(3) of the Act. As the Supreme Court noted in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), it is fundamental in "situations present[ing] a complex of motives" that the decisional body be able to accomplish the "delicate task" of

> weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy

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[12] The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case. See e.g., *Shattuck Denn Mining Company* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).

> the intended consequences upon employee rights against the business ends to be served by the employer's conduct. [373 U.S. at 229.]

Mt. Healthy achieves this goal.

Under the *Mt. Healthy* test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

Finally, we find it to be of substantial importance that our explication of this test of causation will serve to alleviate the intolerable confusion in the 8(a)(3) area. In this regard, we believe that this test will provide litigants and the decisionmaking bodies with a uniform test to be applied in these 8(a)(3) cases.[13]

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[13] Still an additional benefit which will result from our use of the *Mt. Healthy* test is that the perceived significance in distinguishing between pretext and dual motive cases will be obviated.

Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

Finally, inherent in the adoption of the foregoing analysis is our recognition of the advantage of clearing the air by abandoning the "in part" language in expressing our conclusion as to whether the Act was violated. Yet, our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past. For, as noted as the outset of this Decision, our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimen-

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[14] In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

tally affect such employees' employment. Indeed, it bears repeating that the "in part" test, the "dominant motive" test, and the *Mt. Healthy* test all share a fundamental common denominator in that the objective of each is to determine the relationship, if any, between employer action and protected employee conduct. Until now, in making this determination we frequently have employed the term "in part." But in so doing it only was a term used in pursuit of our goal which is to analyze thoroughly and completely the justification presented by the employer. It is, however, our considered view that adoption of the *Mt. Healthy* test, with its more precise and formalized framework for making this analysis, will serve to provide the necessary clarification of our decisional processes while continuing to advance the fundamental purposes and objectives of the Act.

VI. APPLICATION OF THE *MT. HEALTHY* TEST TO THE FACTS OF THE INSTANT CASE

In the instant case, the General Counsel alleges that Respondent discharged Bernard Lamoureux in violation of Section 8(a)(3) and (1) of the Act. Respondent denies this allegation, asserting that Lamoureux was discharged for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." The Administrative Law Judge found that Respondent's discharge of Lamoureux violated Section 8(a)(3) and (1) of the Act. For the reasons set forth below, we agree.

The record reveals that at the time of his discharge, Lamoureux had been employed by Respondent for over 10 years. He had occupied the position of inspector for 2 years and was considered a better than average employee. Indeed, at the hearing, his work was described as admirable. On the day prior to his discharge, Lamoureux's supervisor, Forte, was instructed by the plant superintendent to "check" on Lamoureux, who had been observed entering a restroom carrying a newspaper.[15] The next morning, Forte discovered certain discrepancies in Lamoureux's timesheet. The timesheet indicated that Lamoureux had been working on certain jobs at the time when Forte had been looking for him the previous day but had been unable to find him at his work station.[16] Upon reporting this finding to his own supervisor, Forte was told that "the offense was a dischargeable offense."

Thereafter, Forte was instructed to ask Lamoureux for an explanation. Although Forte did so, the record reveals that Lamoureux's final check had already been prepared when Forte confronted him with the discrepancy. Respondent then rejected Lamoureux's explanation, in which he conceded that he may not have performed the jobs at the times indicated on his timesheet but maintained that the jobs had in fact

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[15] Respondent never contended that such conduct violated shop rules.

[16] It was conceded that Lamoureux's work activities might legitimately have carried him to other parts of the plant. Nevertheless, Forte did not use the paging system to try to locate Lamoureux, or even check the men's room where Lamoureux was last seen.

been performed that day. Lamoureux was promptly dicharged, purportedly for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." Respondent conceded that Lamoureux was not discharged for being away from his work station or for not performing his assigned work.[17]

In presenting his *prima facie* case of wrongful motive, the General Counsel demonstrated that Lamoureux had become a leading union advocate, beginning in 1976. During both the 1976 and 1977 election campaigns, both of which were lost by the Union, Lamoureux actively solicited support for the Union among his fellow employees. It is undisputed that Respondent was well aware of his sympathies and activities. Thus, during the 1977 campaign, which like the 1976 campaign appears to have included aggressive electioneering on both sides, Lamoureux was reprimanded by management, allegedly for pressuring an employee regarding the Union.[18] Also, during the 1977 campaign Respondent's supervisors on several occasions directed gratuitous remarks regarding the Union toward Lamoureux, once calling him the "union kingpin." We also note that the discharge took place just 2 months after the 1977 election.

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[17] In this connection, we note that Respondent did not seek to determine where Lamoureux had been when Forte discovered him absent from his work station, nor did Respondent seek to verify whether Lamoureux had, as he claimed, performed the inspections indicated on his timesheet. Rather, Respondent simply informed Lamoureux that he was no longer worthy of Respondent's trust.

[18] Respondent's witness later conceded that the word "pressure" was too strong.

In addition, it can scarcely be disputed that Respondent harbored animus toward both the Union and union activists, including Lamoureux. Respondent's antiunion campaign included, *inter alia*, references to the murder indictment of an official of one of the Union's sister locals in another State, as well as an unsupported claim that Respondent's "chances for survival and growth would be seriously hurt by the presence of a union." In view of the tone of the campaign, along with Respondent's remarks directed specifically to Lamoureux, we agree with the Administrative Law Judge that Respondent displayed considerble animus toward Lamoureux, whom it considered to be the "union kingpin."

The General Counsel also demonstrated that Respondent never previously had discharged an employee under these circumstances, although, as detailed by the Administrative Law Judge, the record shows that employees commonly completed timesheets as Lamoureux had and that such discrepancies had no effect on the accuracy of the system of production control. It also appears that, of the only two other employees ever discharged for violating the rule regarding the falsification of company records, one was discharged for embezzlement and the other for deliberate forgery of sales records in order to collect fraudulent sales commissions.[19] Furthermore, two employees who had deliberately violated the same rule by falsifying their timecards were issued warnings and were not discharged.

[19] Unlike these employees, it was conceded that Lamoureux could not have benefited financially from the discrepancies on his time sheet.

From the foregoing, we conclude that the General Counsel made a *prima facie* showing that Lamoureux's union activity was a motivating factor in Respondent's decision to discharge him. Our conclusion is based on Respondent's union animus, as reflected in the hostility directed toward Lamoureux resulting from his active role in the union campaign as well as the timing of the discharge, which occurred shortly after completion of the latest union election. Also of significance is Respondent's sudden and unexplained departure from its usual practice of declining to discharge employees for their first violation of this nature. Such action here is especially suspect in light of Lamoureux's admirable work record and the fact that his timesheet discrepancies neither inured to his benefit nor served to affect deterimentally Respondent's production control system.

We further find that Respondent has failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his engaging in union activities. In this regard we note that the record discrepancies were only discovered by Forte following the plant supervisor's directive to "check" on Lamoureux, despite the fact that Respondent had no reason to believe that Lamoureux was untrustworthy. Under the circumstances, such actions suggest a predetermined plan to discover a reason to discharge Lamoureux and thus rid the facility of a union activist.[20] Further undermining Respondent's defense is the evidence which demonstrates disparate treatment.

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[20] See, e.g., *Lipman Bros., Inc., et al.*, 147 NLRB 1342, 1376 (1964), enfd. 355 F.2d 15, 21 (1st Cir. 1966).

As noted previously, the only instances where discharge was imposed by Respondent as a result of "record discrepancies" were where the employee in question sought to embezzle funds or collect fraudulent sales commissions. Lamoureux's infraction clearly did not rise to such a level. Indeed, the record demonstrates that such record discrepancies were commonplace and generally resulted in no discipline whatsoever. In those instances where discipline was imposed, Respondent issued warnings or other forms of discipline short of discharge.

Accordingly, for the reasons noted above, we find that Respondent's discharge of Bernard Lamoureux violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. August 27, 1980

JOHN H. FANNING,
Chairman

JOHN A. PENELLO,
Member

JOHN C. TRUESDALE,
Member

NATIONAL LABOR RELATIONS BOARD

Member JENKINS, concurring:

I am willing to apply the shifting burden-of-proof standard my colleagues adopt for determining whether a discharge was caused by an unlawful purpose where the discharge may have had more than one cause, not all of them unlawful. This standard may suffice for most cases. However, there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. All of them, both lawful and unlawful, may have combined to push the employer to the decision he would not have reached if even one were absent. In such cases, it is plainly not the latest event, the most recent purpose, which is the cause of the discharge; rather, it is all of

them together, from earliest to latest, which cause the discharge.[21]

Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, then plainly the unlawful motive must be deemed to be part of the cause of the discharge, and the discharge is unlawful. By definition, it took all these straws to break the camel's back, so each of them provides a contribution "but for" which the camel would have survived. It is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by his venture into an area prohibited by the Act. Thus, the "in part" standard, as distinguished from the "but for" and "dominant motive" tests, is the only criterion which will effectuate the purposes of the statute. As my colleagues note, the legislative history shows plainly that Congress itself struck this balance, and I read *Mt. Healthy* as also in effect adopting this standard.

Thus, my only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, modification may be required.

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[21] It is the difficulty in singling out one individual cause in such situations which has led to criticism and rejection of a "but for" standard as a measure of cause; there is no logical way to apply a "but for" standard in such cases except to fasten upon the most recent event or motive. See Prosser, "Handbook of the Law of Torts" at 238—239, 4th ed. (1971); LaFave and Scott, "Handbook on Criminal Law," at 249—251 (1972).

Dated, Washington, D.C. August 27, 1980

HOWARD JENKINS, JR.,
Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Bernard R. Lamoureux reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the

backpay he lost because we discharged him, with interest.

WRIGHT LINE, A DIVISION
OF WRIGHT LINE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES WASHINGTON, D.C.

Case 1—CA—14004

WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC.

and

BERNARD R. LAMOUREUX, AN INDIVIDUAL

Robert P. Redbord, Esq.,
and *Richard D. Zaiger, Esq.*,
for the General Counsel.

Julius Kirle, Esq., of Chestnut Hill, Massachusetts, for the Respondent.

Bernard R. Lamoureux of Dudley, Massachusetts, *in propria persona.*

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The charge filed by Bernard R. Lamoureux on January 3, 1978, was served on Wright Line, a Division of Wright Line, Inc., the Respondent herein, on January 4, 1978. A complaint and notice of hearing was issued on February 23, 1978. In the complaint it was charged that the Respondent unlawfully discharged said Bernard R. Lamoureux on December 30, 1977, in violation of Section 8(a)(1) and (3) of the Na-

tional Labor Relations Act, as amended, herein referred to as the Act.

The Respondent filed a timely answer denying that it had engaged in or was engaging in the unfair labor practices alleged.

The case came on for hearing at Boston, Massachusetts, on June 19 and July 10, 11, 12, and 13, 1978. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT,[1] CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

Respondent is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

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[1]The facts found herein are based on the record as a whole and observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

At all times herein mentioned, Respondent has maintained its principal office and place of business at 160 Gold Star Boulevard, in the city of Worcester and Commonwealth of Massachusetts (herein called the Worcester location), and is now and continuously has been engaged at said plant in the manufacture, warehousing, and distribution of accessory products for computer rooms to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts, and causes, and continuously has caused at all times herein mentioned, substantial quantities of materials to be sold and transported from said plant in interstate commerce to States of the United States other than the Commonwealth of Massachusetts.

Respondent annually ships materials valued in excess of $50,000 from its Worcester, Massachusetts, location to points outside the Commonwealth of Massachusetts. Respondent annually receives materials valued in excess of $50,000 at its Worcester, Massachusetts, location directly from points outside the Commonwealth of Massachusetts.

The aforesaid Respondent is and has been engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein referred to as the Union or Teamsters Local 170), is a

labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Facts

On August 27, 1976, and October 20, 1977, representation elections were conducted in Cases 1—RC—14576 and 1—RC—15338, respectively, at the Respondent's facility in a unit of "all production and maintenance employees, including warehousemen, truck drivers, tool and die room employees, new product department employees, and cafeteria employees employed by the Employer at its 160 Gold Star Boulevard and 150 Grove Street, Worcester, Massachusetts locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act." Teamsters Local 170, the only Union on the ballots, lost both elections. During both election campaigns, the Respondent opposed the Union and urged employees to vote against it. In the most recent campaign in 1977, the Respondent issued antiunion letters and leaflets to the employees. In pressing its intense antiunion campaign, the Respondent published reproductions of certain newspaper articles, derogatory of the Teamsters, one of which displayed a picture of Anthony Provenzano in handcuffs with the caption "Teamster Provenzano Indicted in 1961 Murder."

Moreover, the Respondent couched its appeal in terms of survival, for it wrote its employees, "It is our firm belief, which by the way many of our loyal employees share with us, that Wright Line's chances for

survival and growth would be seriously hurt by the presence of a union here . . . . and with your *NO* vote, Wright Line in Worcester can continue on its competitive drive for survival in a very difficult industry." It is positive that the Respondent does not want the Union in its plant.

Lamoureux was the employee who first brought the Union to the Respondent's plant in 1976. He "got things going as far as getting pledge cards, getting lieutenants to pass them out. And so forth." He attended union meetings and solicited union affection at the Respondent's plant. Lamoureux served as an alternate observer at the 1976 election. Lamoureux was as active in the second election as in the first except that he did not serve as an alternative observer. During the 1977 election campaign, Francis O. Forte, supervisor of quality control and time study and Lamoureux's boss, called Lamoureux to Manager of Product Engineering Donald McCallum's office and charged him with having been seen "pressuring someone to vote union in the paint department." Lamoureux denied the accusation and stated if Forte persisted he would like a grievance form. Later Forte apologized and said that his use of the word " 'pressure' was too strong." On another occasion while Lamoureux was counting his paycheck money, Forte remarked, "What's that. Union campaign funds?" Shortly before the 1977 election Rudolph Tuoni, the maintenance foreman, said to Lamoureux, "Everybody knows you're the Union kingpin."[2]

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[2] This testimony was not denied.

Lamoureux was employed as an inspector and was assigned to departments 12 and 14 where he inspected pieces fabricated by the machines in these departments. The function of department 12, the forming department, was to "form bends and angles of the sheet metal parts." Department 14 "performs the operation of welding one or more sheet metal parts together to form components."[3] Lamoureux's job was (as explained by Lamoureux) "just to see that all manufactured items were within blueprint specifications, and through job experience there were a lot of other small areas, such as fit and things like that, which were not on the blueprint."

When a machine was set up in either department 12 or 14[4] Lamoureux performed what was termed a first-piece inspection by which he determined whether the piece produced came up to the blueprint specifications. If it did not, production was not permitted until the piece passed inspection. When the inspector was not available, the setup man or the foreman was authorized to pass a first piece. After a favorable first-piece inspection was completed a written approval was endorsed on the "traveling inspection document [traveling inspection report] which goes with the blueprint for each job." In addition to first-piece inspections, Lamoureux also performed intermediate inspections of the fabricated pieces while the machines were running in order to ascertain whether a variance

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[3]The Respondent "primarily makes sheet metal parts that form a storage system for the computer industry."

[4]There were 15 or 20 machines in department 14, and 12 machines in department 15.

from the specifications had occurred. The "start" time of each inspection, whether first-piece or intermediate, was recorded on a daily activity sheet[5] on which the piece inspected was identified by number. In addition to the first-piece and intermediate inspections, Lamoureux from time to time performed visual spot inspections of finished pieces stored in holding areas located in the vicinity of the departments. No entries for such spot inspections were required on the daily activity sheet. As part of Lamoureux's job, according to Forte, "[t]here would be times that possibly a part might not conform to the blueprint and if Mr. Lamoureux would feel better by going into another area and checking to see that the part could function as is before making a disposition, he had this universal authority to do that . . . . [i]n the holding areas or the Assembly Department or even Product Development."[6]

On the morning of December 29, 1977, Paul Southard, the plant superintendent, around 9:55 a.m. came to Forte's office and told Forte that he had seen Lamoureux "taking a newspaper and going into the men's room." He asked Forte to "check it out and find out what was going on." Forte went to departments 12 and 14 and continually walked back and forth through these departments for about 35 minutes looking for

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[5] While the daily activity sheet provided for an entry of the start time, Lamoureux testified that he usually entered the finish time. The sheet provided no place to enter the finish time.

[6] An inspector's assignments are always sufficient "to consume 100% of his time."

Lamoureux.[7] About 10:35 a.m. Lamoureux, approaching from the direction of department 16, appeared in department 14. Forte said nothing to Lamoureux but returned to his office where he allegedly wrote, "Bernie not in Dept. 12 or 14 from 10:00 to 10:35—Then saw him at far end of Dept. near time clock." In the afternoon, about 1 o'clock, Forte was distributing a description of a dental plan to the inspection department and was unable to find Lamoureux in department 12 or 14. After about 25 minutes Forte found Lamoureux at a workbench inspecting a part. Forte said, "I've been looking for you. I've got to give you this dental plan." Nothing else was said. Forte returned to the office and allegedly noted, "12:50 to 1:05 not in Dept. 12 or 14, 1:10 to 1:20 not in Dept. 12 or 14. Then he was at coil bench w/pc at 1:20 p.m." Forte did not ask Lamoureux where he had been.

According to Forte, the next morning he checked Lamoureux's daily activity sheet and discovered that Lamoureux had noted that he had performed four inspections between 10 a.m. and 10:35 a.m. and three inspections between 12:55 p.m. and 1:15 p.m., the times when Forte had not seen him in either department 12 or 14. Forte reported his findings to his supervisor, McCallum. McCallum thought that "the offense was a dischargeable offense" and asked Forte to immediately accompany him to the office of Carl Dean, the vice president of manufacturing, and "explain the situation to him in regard to the violation."

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[7] Forte did not check the men's room referred to by Southard nor did he use the paging system to try to locate Lamoureux.

Forte reviewed his findings for Dean, after which Kendall Allen Hodder, the personnel director, was called to the meeting. Dean allegedly said "to check it out with Mr. Lamoureux to find out . . . what the story was. And . . . if what [Forte] found was substantiated through Mr. Lamoureux's description of what might have gone on, then we could discharge him." Thereafter Forte reduced the events involving Lamoureux to writing. A part of this memorandum recited:

> His record sheet shows he allegedly performed specific inspection operations [in] designated departments at times he himself recorded when he was not there as determined by personal and direct observation of his supervisor. This is a categorical violation of group 1 rule #2—falsification of time reports.

Group 1, rule 2, provides that an employee may be discharged for the first infraction of "[k]nowingly altering or falsifying production time reports, payroll records, or time cards, or punching another employee's time card without supervisory approval."[8]

An examination of the traveling inspection report and the credible record reveals that Lamoureux had performed all the inspections noted on his daily activity sheet during the times he was absent from departments 12 and 14. In this regard, Forte testified that "it was irrelevant as far as whether he did the work or didn't do the work as far as the decision to discharge." Forte testified also that he made no effort to deter-

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[8]Personnel Director Hodder testified that the Respondent, under the rule, could exercise its discretion whether to discharge an employee or administer a lesser penalty.

mine whether inspections had actually been made,[9] although that fact could have been ascertained. Later in his testimony on redirect examination, Forte said he was instructed by McCallum to check the traveling sheets while the summary was being typed up and before Lamoureux was contacted. Forte said that he discovered from the traveling sheets that Lamoureux had signed the sheets. Prior to Forte's testimony, McCallum had testified, when called by the General Counsel, to the question:

> Q. But you never made a check on it to see if he actually did [the work] or not?
>
> A. That was not the issue here.

Later, after Forte had testified, McCallum as Respondent's witness testified that:

> I went with him [Forte] for a brief amount of time to evaluate the traveling inspection documents which also go with the job. This evaluation did not indicate anything that would change our mind regarding the offense; there were some documents which had been signed by Mr. Lamoureux and others that had not and in some cases he would not have been required to sign them as there were intermediate inspections involved.[10]

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[9] Forte was asked:

> Q. Then I can assume, can I not, that you made no effort to determine if, in fact, these particular inspections were or were not made, correct?
>
> A. Correct.

[10] The change in the testimony of Forte and McCallum appears to have been an attempt to create the semblance of an investigation whereas there had been none.

At 3 p.m. Lamoureux was called to a meeting with Hodder, McCallum, and Forte. Lamoureux described what occurred:

> Well, they had me read the report and Mr. Forte said that he was out in the departments at that time, and he could not find me there and he showed me my sheets with the times on them. He asked me where I was and I told him I had gone to the men's room, but I had checked the jobs out.[11] So they said, "Well, you've got the times wrong." I believe it was Mr. Hodder and he said, "Didn't you read your rulebook?" So I think it was around that time that I told him, "C'mon, you guys, you know I'm in here because of the Union."
>
> And, Mr. McCallum stated that he didn't believe Frank could trust me anymore,[12] and he didn't even know if the jobs were checked out or not, and that they were going to discharge me; and they gave me my check.

During the conversation Lamoureux told them that the "times weren't accurate and they never were, but [he] told them, 'If you want them right to the second, I can put them right to the second.' " Lamoureux also said that he had made visual checks during the time he was away from departments 12 and 14.[13]

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[11] McCallum testified that Lamoureux told them that he had "performed them earlier, and then just wrote these times in there to fill out this sheet."

[12] McCallum testified that he told Lamoureux that "we could no longer trust him to perform his function, and the requirements of the job, and for falsification of these records." McCallum also observed that "Union activity in no way had anything to do with it."

[13] Forte testified that Lamoureux said he was "down probably in the back checking something."

McCallum asserted that Lamoureux was discharged for falsification of time reports and for no other reason. McCallum explained, "Both Mr. Forte . . . and myself felt that we could no longer trust Mr. Lamoureux in performing his duties. He was indicating that he was on the job, specifying that he actually performed work when he was nowhere near the area; and therefore we could no longer trust him to carry out the duties of his function."

No other employee had been discharged under the same circumstances as Lamoureux.[14] However, employee Geradi, who violated a group 1 rule, was warned not discharged;[15] employee Gleason, who also violated a group 1 rule, was likewise warned and not discharged.[16] In fact, it would appear from an examination of the Respondent's handbook of information for employees that the Respondent was not a harsh employer but tried to understand and be helpful with its employees' problems. In referring to the personnel department, the handbook reveals that "they are here to give you help and guidance. They are expected to insure that both sides of the problem are being brought out fairly. . . . We believe it is healthy to talk

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[14]The only other discharges for falsification of records involved one employee, a salesman who falsified his call reports, thus enabling him to collect money for calls he was not making, and another employee, an accountant, who was embezzling money.

[15]His offense had been deliberate slowing down of production.

[16]Other employees who were only warned were D. Geoffrey, who punched another employee's timecard, and Valerie Rousseau, chief inspector, who failed to punch her timecard and "admitted . . . that someone was punching her timecard. Did not notify her supervisor."

about grievances." Moreover, Forte said that there would have been "nothing wrong" with Lamoureux being in the "bathroom for 15 to 20 minutes." Indeed, Forte agreed that Lamoureux could have been legitimately away from departments 14 and 15 during the time involved for a "multitude of reasons," including conferring with other inspectors in other parts of the plant which could have kept him away from the departments for 10 or 15 minutes, "getting a part from stock" which could have consumed "[m]aybe forty-five minutes," or going to the research and development department.[17] McCallum agreed that a dollar value could not be placed on Lamoureux's inaccurate reporting and considered money not to be the "issue." Moreover, McCallum admitted that Lamoureux had nothing to gain by the alleged falsification.

Lamoureux commenced working for the Respondent in November 1966, and had been an inspector for over 2 years.[18] His work was satisfactory; he received merit increases. When Forte rated Lamoureux in 1977, he was rated average or better than average in all categories (eight categories were marked average; seven better than average). In "potential for advancement," he was rated better than average. In this regard, Lamoureux was trained in the use of the optical comparator, a task which only one other inspector (Rousseau) was capable of performing. It involved the

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[17] It would seem that the reason Forte failed to inquire of Lamoureux as to his whereabouts during his absence was due to the fact that he did not consider Lamoureux's absence to require explanation.

[18] McCallum agreed with the General Counsel that the Respondent had a "real investment" in Lamoureux as an inspector.

inspection of plastics, a difficult job. Lamoureux had instructed other inspectors and had instructed both McCallum and Forte on the optical comparator. Lamoureux had never been disciplined nor had any foreman found fault with his work. From time to time, Lamoureux made helpful suggestions to the Respondent, for which he was commended. Forte agreed that Lamoureux showed concern about doing a good job. A few weeks before Lamoureux was discharged, Forte had commended him for the good work he had performed on the night shift. Forte agreed from his observation of Lamoureux that he "knew what he was doing and could do the job." In fact, Forte said that Lamoureux "seemed to be very proud of the amount of work he was doing." Indeed, Forte commented, "I was very satisfied with the amount of work that it appeared that he was doing." Forte added, "Just looking at the sheets, I would assume that Mr. Lamoureux was performing in an admirable fashion." There is little question that the credible evidence establishes that Lamoureux did perform in an "admirable fashion," except for the inaccuracies which appeared on his daily activity sheet for December 29, 1977. The inattention which the Respondent allowed this detail is illustrated by an examination of several inspectors' daily activity reports. John Murdock's sheet for October 30, 1977, reveals that he entered a start time at 7:75 and the next at 8:00; another at 12:90 and the next at 1:10; and another at 1:75 and the next at 2:00. Other sheets reveal the same discrepancies. On V. Rousseau's sheet of October 28, 1977, she reported start times of 7:60, 7:70, 7:80, and 8:00. On another sheet, she reported 14:80 and 15:00 as successive start times. Her Oc-

tober 25, 1977, sheet shows starting times of 7:50, 7:60, 7:70, 7:80, and 8:00. The same was true on October 24. Other discrepancies appear in her sheets which lead to the conclusion that these were "plugged" entries. A cursory examination of these sheets would have revealed these inaccuracies.

Lamoureux testified that when the form first came out John Larson,[19] his supervisor at the time, told the employees that recording "the time was just to have a general idea of when the part was in a particular area of the shop." Lamoureux further said that Forte had not given oral or written instructions on the subject. Larson testified that he wanted something to the "closest five minutes." Larson also testified that the Brooks system, which was instituted after he put the daily activity sheets into effect, used the form to relate the total number of inspections to production. Larson explained:

> [I]f there were fifty operations run in the department and we covered forty, if we inspected forty of them, we'd have got an eighty percent coverage.

Precise time entries were not considered much of a factor as long as the inspection actually occurred. Both Larson and Forte, who followed Larson as supervisor, reviewed the daily activities sheets of all inspectors and entered on a weekly performance report the percent coverage for each department. The percent coverage was derived from comparing the number of new operations with the number of first-piece inspections. Nothing in this report was related to the time of

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[19] Larson is no longer in the Respondent's employ.

each piece inspection. These reports were reviewed by McCallum.

According to McCallum, the weekly performance reports covered "the percent of coverage in relationship to first piece inspections to the total number of jobs that ran that particular area for the previous week" (80-percent coverage was the norm); "the average number of inspections performed by each individual inspector in a 1-hour period"; the number of inspections performed per hour per inspector (the average inspection took 10 to 15 minutes;[20] and "the actual hours worked both in a daily and weekly basis by inspectors versus planned work hours." Precise time entries for the inspection of each piece were not essential to preparing the weekly performance report.[21] Referring to the daily activity sheet, McCallum said, "We utilize these records for determining levels of staffing, and department and individual performance within a department." Since the sheet noted only start times, there was no way of ascertaining from the sheet (unless otherwise noted) what had been done between the times of the entries.[22] However, the procedure which requires the approval by an inspection before a piece may be produced and the inspector's notation on the

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[20] Forte said the average inspection took about 12 minutes.

[21] McCallum agreed with the General Counsel that the form could be filled out without reference to the entry of a starting time.

[22] Forte testified that a completion time was not included because "the Inspector's job is to continually inspect. When you finish one job and start the next, that is an encompassing factor of the operation. It may be getting of tools and putting away of tools that have to go with the inspection of any given part."

traveling inspection report is a positive check as to whether the inspector has performed the inspection.

II. CONCLUSIONS AND REASONS THEREFOR

It is well established that the General Counsel bears the burden of proving an unlawful discharge,[23] however, ". . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." (Emphasis in original.)[24]

Here, the General Counsel has provided ample proof of the Respondent's antiunion motivation. In this regard, the General Counsel has offered credible proof that the discharge of Lamoureux, a union kingpin, would have gratified the Respondent's antiunion stance;[25] that the Respondent had knowledge of Lamoureux's union connections and knew that he was

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[23] See *N.L.R.B.* v. *Borden Co.*, 392 F.2d 412, 416 (C. A. 5, 1968); *G. H. Hicks and Sons, Incorporated*, 141 NLRB 1272, 1273 (1963).

[24] *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

[25] "Of course, the company has a legal right to 'make no bones about its opposition to the Union.' *Hendrix Manufacturing Co.* v. *N.L.R.B.*, 321 F.2d 100, 103 (C.A. 5, 1963). However, the Board is entitled to consider emphatic anti-union attitudes as 'background' against which to measure the impact on employees of management's statements and conduct. 321 F.2d at 103-04, fn. 6." *Independent Inc., d/b/a The Daily Advertiser* v. *N.L.R.B.*, 406 F.2d 203, 205 (C.A. 5, 1969).

a union kingpin;[26] that usually the Respondent did not discharge an employee for the commission of a first offense of the kind here committed; and that the Respondent sustained no losses by reason of Lamoureux's misconduct. Moreover, the Respondent had a substantial investment in the cost of training Lamoureux as an inspector. Additionally, Lamoureux was a satisfactory employee, considered by the Respondent to have been good material for advancement.[27] Without a doubt, the General Counsel has established a *prima facie* case.[28]

In response to the General Counsel's *prima facie* case, the Respondent claims as "legitimate objectives"

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[26]"The discharge of employees who are actively engaged in union affairs gives rise to an inference of violative discrimination." *N.L.R.B.* v. *Montgomery Ward & Co., Incorporated*, 554 F.2d 996, 1002 (C.A. 10, 1977).

[27]"The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance. But if the employee is a good worker and his breach of the work rules trival, the more rational explanation for discharge may be invidious motivation. Such motivation can be found from the absence of any good cause for discharge. This must be so unless we are willing to assume something we know to be false: that businessmen hire and fire without any reason at all.

"In the end after weighing all relevant factors including particularly the gravity of the offense, an unfair labor practice may be found only if there is a basis in the record for a finding that the employee would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity." *Neptune Water Meter Company, a Division of Neptune International Corporation* v. *N.L.R.B.*, 551 F.2d 568, 570 (C.A. 4, 1977).

[28]"Fundamentally, a *prima facie* case is one which is established by sufficient evidence and can be overcome only by a preponderance of competent, credible rebutting evidence." *National Automobile and Casualty Insurance Co.*, 199 NLRB 91, 92 (1972).

the fact that Lamoureux must remain discharged because his recording of inaccuracies in start times for inspections exhibited an untrustworthiness which it cannot abide in its employees.[29] It added at the hearing that Lamoureux's alleged offense jeopardized the Brooks system of production control.[30] In weighing the Respondent's alleged justification for its conduct, it must be considered that "'an employer may hire and discharge at will, so long as his action is not based on opposition to union activities.'" *N.L.R.B.* v. *The Little Rock Downtowner, Inc.*, 341 F.2d 1020, 1021 (C.A. 8, 1965), citing *N.L.R.B.* v. *South Rambler Company*, 324 F.2d 447, 449 (C.A. 8, 1963). "[A]bsent a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." *O. A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (C.A. 5, 1967). However, "[t]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity." *N.L.R.B.* v. *Symons Manufacturing Co.*, 328 F.2d

[29] "There is clearly no obligation on the Board to accept at face value the reason advanced by the employer." *N.L.R.B.* v. *Buitoni Foods Corp.*, 298 F.2d 169, 174 (C.A. 3, 1962).

[30] This alleged justification has no validity at all. The credible evidence discloses that the start time entries are not essential nor are they noticed in the compilation of the weekly performance report which is the only document from the inspection department which is utilized within the Brooks system. The Brooks system functions without reference to the start time entries. The Respondent's reliance on this unsubstantiated justification is totally unconvincing and "bear[s] the hallmarks of afterthought." *N.L.R.B.* v. *S.E. Nichols-Dover, Inc.*, 414 F.2d 561, 564 (C.A. 3, 1969).

835, 837 (C.A. 7, 1964). "A justifiable ground for dismissal is no defense if it is a pretext and not the moving cause." *N.L.R.B.* v. *Solo Cup Company*, 237 F.2d 521, 525 (C.A. 8, 1956). "[T]he 'real motive' of the employer in an alleged § 8(a)(3) violation is decisive. . . " *N.L.R.B.* v. *Brown Food Store*, 380 U.S. 278, 287 (1965). I am convinced that the "real motive" for the Respondent's discharge of Lamoureux was to discourage membership in a labor organization. As for trustworthiness, Lamoureux's work pattern had been the same for over 2 years, concerning which the Respondent had registered no complaints. His work had been satisfactory. The amount of work he produced indicated that he had not and was not cheating the Respondent. His production satisfied the norm set by the Brooks system. Moreover, if the untrustworthiness charge (which sprang from the inaccuracies in the start time recording) is valid, then other inspectors would also have been guilty of untrustworthiness since their daily activity reports disclosed on their faces (and easily discernible) inaccuracies in the recording of start times.[31] Indeed, the credible evidence does not reveal that the Respondent had insisted on a wholly accurate recording of the start times. Furthermore, other employees who were guilty of group 1 rule offenses were warned rather than discharged for the first offense.[32] Moreover, considering the high standard of trustworthiness which the Respondent was exacting from

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[31] The little apparent attention which the Respondent gave this detail obviously invited abuse.

[32] "[V]ariance from the employer's 'normal employment routine'" further supports illegal motive. *McGraw-Edison Company* v. *N.L.R.B.*, 419 F.2d 67, 75 (C.A. 8, 1969).

Lamoureux, it is incongruous that it required so little from Chief Inspector Rousseau that she received only a warning for having another employee punch her timecard. Her "phonied up" timecard should arouse a strong suspicion of dishonesty since she could have used the phony card to cover up an absence, tardiness, or early quitting time, any of which would have cost the Employer money. Moreover, if Rousseau had "phonied up" her timecards, it seems likely that she might have "phonied up" her start times on her daily activity sheets. For the offense Rousseau could have been discharged (see Group 1, rule 2, cited above), but she was not. Disparate treatment is obvious; discrimination proved.[33]

Thus, the record reveals that Lamoureux's first offense of seemingly inoffensive significance[34] (at least when measured by the Respondent's past practice) was blown up to a point where it accommodated the Respondent's antiunion stance.

The credible evidence further supports a finding that Forte showed little concern for Lamoureux's absence from his job on the two occasions even though Plant Superintendent Southard asked him to check Lamoureux out. His concern deepened only after his conference with McCallum, and the whole incident ripened into a discharge after Dean and Hodder be-

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[33] This discrimination assumes a more pronounced aspect when one considers the reprehensible character of phony timecards which the Board describes in *Rock Tenn Company, Corrugated Division*, 234 NLRB No. 126 (1978), "[F]alsification of the timecard amounts to dishonesty and theft."

[34] When measured in terms of need for the information to be derived from exact start times, the offense becomes trivial.

came involved. Indeed, the decision to discharge and the preparation of Lamoureux's final check were wholly completed before the Respondent allowed Lamoureux to counter the charge of untrustworthiness. His discharge was already a *fait accompli*. His good points, the fact that he had actually made the inspections and was not cheating the Respondent, and his explanation for the inaccurate recordings were ignored in reaching the decision to discharge him. The Respondent's attitude was—"Ah ha, we caught him committing an infraction, he must be summarily fired without recourse." This attitude seems strange and unexplainable for an employer who boasts an enlightened approach to employee problems and grievances in its handbook. It is obvious that the seriousness of the offense was magnified to fit the Respondent's predetermined penalty. When "the reasons advanced [for a discharge] are not persuasive, the [protected activity] may well disclose the real motive behind the employer's action." *N.L.R.B.* v. *Melrose Processing Co.*, 351 F.2d 693, 699 (C.A. 8, 1965).

I am convinced that the Respondent's "real reason" for discharging Lamoureux was concealed and the reason aserted by the Respondent was false. I draw this conclusion from the record as a whole and from the demeanor of the witnesses produced by the Respondent. I do not believe that they were truthful in revealing the "real reason" for Lamoureux's discharge. The Board has recently said in *Best Products Company, Inc.*, 236 NLRB No. 108 (1977):

> In *Shattuck Denn Mining Corporation* v. *N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966), the

> court stated that where the trier of fact finds that an asserted motive for discharge is false he can infer that there is another motive. "More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference."

In any event I conclude that the discharge of Lamoureux was not based on the reasons declared by the Respondent, but resulted from the Respondent's desire to discourage union activity and gratify its anti-union purposes.[35] "'It is well settled that the mere existence of a valid ground for discharge is no defense to an unfair labor charge if such ground was a pretext and not the moving cause.' It must be shown, however, that the improper motive—union activity—is the dominant reason for the discharge. . . " *N.L.R.B.* v. *Pioneer Plastics Corporation*, 379 F.2d 301, 307 (C.A. 1, 1967). "[A] business reason cannot be used as a pretext for discriminatory firing." *N.L.R.B.* v. *Ayer Lar Sanitarium*, 436 F.2d 45, 50 (C.A. 9, 1970). Respondent clearly used its reasons as pretexts. It is also clear that the "dominant reason for discharge" was Lamoureux's union activities. Cf. *Berbiglia, Inc.*, 237 NLRB No. 18 (1978).

In consideration of this finding, I have reviewed the decisions of the First Circuit upon which the Respondent so heavily relies. The Respondent asserts that the General Counsel has not met the burden of

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[35] In this regard, the Respondent had vigorously opposed the Union during the 1976 and 1977 election campaigns, and no doubt by the discharge of Lamoureux was preparing for the 1978 campaign.

proof in such decisions, specifically citing *N.L.R.B.* v. *Rich's of Plymouth, Inc.*, 578 F.2d 880, 886 (C.A. 1, 1978), as follows:

> Respondent having offered a legitimate business justification for its conduct, the burden shifted to the Board to establish by substantial evidence "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one," *N.L.R.B.* v. *Billen Shoe Co.*, 397 F.2d 801, 803 (C.A. 1, 1968). In our *repeated efforts to impress this standard* upon the Board we have variously redefined it to mean that the decision would not have been made "but for" the employee's union activity, *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292, 1293 (C.A. 1, 1977), that union animus was the "dominant" reason, *N.L.R.B.* v. *Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (C.A. 1, 1963), or the "controlling" motive, *N.L.R.B.* v. *Fibers International Corporation*, 439 F.2d 1311, 1315 (C.A. 1, 1971). By whatever phraseology, we have attempted to make it clear that *the mere existence of anti-union animus is not enough*" to make out a section 8(a)(3) violation, *N.L.R.B.* v. *Billen Shoe, supra*, 397 F.2d at 803. [Emphasis supplied.]

In addition, I have examined the First Circuit decisions cited in the *Rich's of Plymouth* case, *Hubbard Regional Hospital* v. *N.L.R.B.*, 98 LRRM 2891, 84 LC ¶10,665 (1978), cited by the Respondent, and *P.S.C. Resources, Inc.* v. *N.L.R.B.*, 576 F.2d 380 (1978).[36] While I am not convinced that the Re-

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[36] In this case, the court used the language: "However, the evidence that the reasons petitioner has offered for the discharge are 'inconsistent with its previous practice, against its apparent interest and inconsistent with its subsequent ac-

spondent has offered a legitimate business justification for its conduct (since Lamoureux's omission could have been easily corrected by counseling without any serious consequence to the Respondent),[37] nevertheless, assuming *arguendo* that a legitimate business justification was forthcoming, I am convinced that the General Counsel has met the First Circuit's burden. The Respondent chose the "bad" cause because it wanted to rid itself of a union partisan and commence to gird itself against the probable next union election campaign. I do not think this was Forte's idea. It originated with Forte's supervisors. I consider Forte to be an honest, forthright individual who was not generally given to lying. As I watched him testifying, this impression prevailed until he was subjected to questions concerning Lamoureux's discharge. Here, being gen-

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tions' . . . sufficiently compensates for the other weak links in respondent's case." 576 F.2d at 384. In the instant case, it obviously was not in the Respondent's best interests to discharge a well-trained, competent employee (who was considered a "real investment"). Moreover, for offenses involving untrustworthiness of as serious a nature, the Respondent had not discharged employees. Indeed, there was no showing by credible evidence that it had been the Respondent's general practice to discharge an employee where the consequences of his offense caused little serious detriment to the Respondent, as here, for the first offense.

[37] "Such action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had had no other circumstances in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practice, would be almost inevitable. The summariness of the discharges of these employees, admittedly theretofore satisfactory, gives rise to a doubt as to the good faith of the assigned reasons." *E. Anthony & Sons, Inc.*, 163 F.2d 22, 26—27 (C.A.D.C., 1947).

erally a truthful man, he showed physical signs of dissembling. One would have had to have been a novice in this business not to have known he was covering up for his superiors. The Lamoureux incident became a "Federal case" upon its having reached a level of supervision beyond Forte where it was decided that Lamoureux should be discharged forthwith. Indeed, his final check was drawn before he was allowed to state his position.[38]

Respondent's reasons for Lamoureux's discharge were both false and pretextual. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Bernard R. Lamoureux on December 30, 1977.[39]

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it

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[38] As the court observed in *United States Rubber Company* v. *N.L.R.B.*, 384 F.2d 660, 662—663 (C.A. 5, 1967), "Perhaps most damning is the fact that [the employee was] summarily discharged after reports of . . . misconduct . . . without being given any opportunity to explain [his conduct] or give [his] version of the incidents." Here Lamoureux's hearing was to give an air of legitimacy to unlawful action already taken.

[39] I have considered the decision of the Massachusetts Division of Employment Security in which it was found that "the claimant did not falsify his daily quality control sheet as alleged by the employer," pursuant to the Board's decisions on the subject. *Duquesne Electric and Manufacturing Company*, 212 NLRB 142 (1974). However, had I not considered it, my decision would have been the same.

will effectuate the policies of the Act for jurisdiction to be exercised herein.

3. By unlawfully discharging Bernard R. Lamoureux on December 30, 1977, and refusing thereafter to reinstate him, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the Respondent unlawfully discharged Bernard R. Lamoureux on December 30, 1977, in violation of Section 8(a)(3) and (1) of the Act, it is recommended in accordance with the Board policy that the Respondent be ordered to offer the foregoing employee immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing if necessary any employee hired on or since December 30, 1977, to fill said position, and make him whole for any loss of earnings that he may have suffered by reason of the Respondent's acts herein detailed, by payment to him of a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the

date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB No. 117 (1977).[40]

Additionally, because the Respondent's unfair labor practices go to the very heart of the Act, a broad order requiring Respondent to cease and desist from in any other manner infringing upon rights guaranteed to its employees by Section 7 of the Act is recommended. *N.L.R.B.* v. *Entwistle Manufacturing Co.*, 120 F.2d 532 (C.A. 4, 1941).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[41]

The Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[40] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[41] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Discouraging membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any of its employees or discriminating against them in any other manner with respect to their hire or tenure of employment in violation of Section 8(a)(3) of the Act.

(b) In any other manner interfering with, restraining, or coercing any employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended, to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Bernard R. Lamoureux immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging if necessary any employee hired to replace him and make him whole for any loss of pay that he may have suffered by reason of the Respondent's unlawful discharge of him in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its facility at Worcester, Massachusetts, copies of the attached notice marked "Appendix."[42] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C. October 27, 1978

/s/ _____

LOWELL GOERLICH
Administrative Law Judge

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[42] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties participated and offered evidence, the National Labor Relations Board has found that we unlawfully discharged Bernard R. Lamoureux because he engaged in lawful protected union activities and it has ordered us to post this notice and abide by the following:

WE WILL NOT discourage membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

WE WILL offer Bernard R. Lamoureux reinstatement to his former job or, if his job no

longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

WRIGHT LINE, A DIVISION
OF WRIGHT LINE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 328017 74